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No. 82-1017

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

CLIFTON M. McCLURE, *Petitioner*,

v.

UNDER SEA INDUSTRIES, INC.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR UNDER SEA INDUSTRIES, INC. IN OPPOSITION

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QUESTION PRESENTED

Under Section 4 of the Clayton Act, 15 U.S.C. § 15, a private antitrust plaintiff must prove injury to its business or property caused by an alleged antitrust violation in order to recover treble damages. Accordingly, the only question now presented is:

Whether the court of appeals correctly determined, as a factual matter and based upon a careful review of the voluminous record, that "the evidence fails to support a reasonable inference of injury" to petitioner resulting from a claimed dealer boycott conspiracy where petitioner admitted that at least eight dealers either sold or offered to sell him product at dealer cost?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a-8a) is reported at 671 F.2d 1287. The *per curiam* opinion of the court of appeals denying rehearing and rehearing en banc (Pet. App. B, 9a-11a) is reported at 685 F.2d 1309.

STATEMENT

This case involves an alleged boycott conspiracy to prevent petitioner McClure, a diving equipment retailer, from purchasing Scubapro brand products from other retail dealers. At trial, however, McClure and his witnesses admitted that four dealers actually sold Scubapro equipment to McClure at dealer cost and that at least four other dealers affirmatively offered to sell McClure any additional equipment he might require. On this basis, the Eleventh Circuit found that there

was insufficient evidence of any injury to McClure and that, in the absence of this essential statutory element, McClure's claim for antitrust treble damages must fail.

1. Factual Background

Respondent Under Sea Industries, Inc. ("USI") is a manufacturer of diving equipment marketed under the name, Scubapro. Petitioner McClure is a retail distributor of scuba diving equipment and, together with his wife, operates a dive shop in Huntsville, Alabama. For a number of years, McClure was authorized by USI to sell, repair and service Scubapro products. USI, however, terminated McClure's Scubapro authorization in June, 1977 after two years of decreasing equipment purchases and a deteriorating relationship. (Pet. App. A, 1a-2a.)

Immediately after his termination, McClure made arrangements with two authorized Scubapro dealers to buy Scubapro equipment at dealer cost. McClure also began purchasing equipment at dealer cost from two additional dealers in the ensuing months. McClure's supply of Scubapro equipment was uninterrupted and none of his four dealer suppliers placed any limits on the amount of equipment he could buy. McClure was able to purchase Scubapro product at dealer cost, the same price he had previously paid to USI, and shipments from the most distant dealer-supplier required about the same length of time as did shipments from the USI factory. Although McClure had purchased from USI on a C.O.D. basis, he was able to purchase equipment from his dealer sources on credit or by other financial arrangments of his choice. (Pet. App. A, 6a-7a.)

Besides the four dealers who were systematically supplying Scubapro equipment to McClure after his termination as an authorized dealer, McClure and his wife also admitted that several other dealers had expressly offered to sell them additional Scubapro products. These additional offers, however, were never pursued. (Pet. App. A, 7a.)

Thus, from the time he first received word of his termination, McClure purchased Scubapro equipment from several dealers and had offers from still other dealers to sell him any such equipment he might require. Despite his readily available actual and potential sources of supply, McClure telephoned a few additional dealers during December, 1977, and January, 1978, who purportedly declined his solicitations. Immediately thereafter, on February 2, 1978, McClure filed this lawsuit against USI. (Pet. App. A, 2a.)

2. Proceedings Below

McClure's complaint charged: (1) that USI terminated his Scubapro authorization as part of a conspiracy to restrain trade and monopolize the scuba equipment industry; (2) that USI engaged in illegal resale price maintenance and territorial allocations; and (3) that USI organized a dealer boycott to preclude McClure from purchasing Scubapro equipment from other authorized dealers after his termination. The case came on for trial and, after the close of McClure's evidence, the district court directed a verdict in USI's favor on the first two causes of action.[1] USI's motion for a directed verdict on the post-termination dealer boycott claim, however, was denied and the trial proceeded on this issue alone. (Pet. App. A, 2a-3a.)

Altogether, trial in the district court lasted three weeks and generated an evidentiary record of more than 3,000 pages of trial transcript and several file drawers of exhibits. After USI's renewed motion for a directed verdict at the close of all the evidence was denied, the jury returned a verdict for $20,000 single damages. The trial judge subsequently entered judgment for treble that amount plus costs and an attorney's fee and, following denial of its motion for a judgment notwithstanding the verdict or a new trial, USI appealed. (Pet. App. A., 3a.)

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[1] McClure did not appeal the district court's directed verdict on the issues of illegal termination and resale pricing/territorial practices. (Pet. App. A, 4a-6a & n.3; Pet. App. B, 10a.)

On appeal, the Eleventh Circuit undertook a detailed analysis of the factual record concerning McClure's claims of injury resulting from the alleged post-termination dealer boycott. Even assuming McClure had been prevented from buying Scubapro equipment from certain authorized dealers,[2] the court of appeals nonetheless concluded that "the record fails to support a reasonable inference that he was injured thereby" (Pet. App. A, 6a). In particular, the court of appeals reviewed the extensive evidence, including numerous admissions by both McClure and his wife, establishing that McClure was able to purchase unlimited quantities of Scubapro products at dealer cost from his numerous dealer-suppliers (*id.* at 6a-7a). As the court of appeals concluded:

> Thus, McClure was able to purchase Scubapro equipment after the termination on very favorable terms. He was not injured by the refusal of the few alleged boycotting dealers to sell equipment. They could offer him nothing more than the selling dealers were already providing. (*Id.* at 7a.)

The court of appeals subsequently reconfirmed its ruling in denying McClure's petition for rehearing and suggestion for rehearing en banc (Pet. App. B., 9a-11a). Underscoring the factual nature of its determination, the court stated: "After a search of the record in this case, we find no evidence at all which discloses that McClure was injured by an alleged post-termination boycott conspiracy" (*id.* at 10a). Thus, "even assuming the existence of an alleged boycott conspiracy," the evidence demonstrates that it "was totally ineffective" and that therefore "the prerequisite causal connection between any alleged violation and injury is absent" (*id.*).

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[2] USI's appellate briefs strenuously contested the jury's threshold finding of a boycott conspiracy on grounds of insufficient evidence, prejudicial hearsay rulings by the trial judge, and improperly suggestive jury instructions. The court of appeals did not review these additional assignments of error since the "complete absence of evidence" to infer injury causally related to the alleged dealer boycott required reversal in any event. (Pet. App. A, 8a.)

ARGUMENT

This case presents no question warranting review by this Court. The only issue presented is factual: whether the evidence supports a reasonable inference of injury to McClure resulting from an alleged dealer boycott. Based on a careful review of the voluminous trial record, the court of appeals unanimously determined that it did not. This factual finding as to the sufficiency of evidence is fully supported by the record and consistent with well-settled principles of antitrust law. Accordingly, further review is both unnecessary and unwarranted.

1. Section 4 of the Clayton Act, 15 U.S.C. § 15 (Pet. 2), provides that a private plaintiff may sue for treble damages only if he has been "injured in his business or property by reason of" an alleged antitrust violation. Accordingly, "[t]o recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981); *see Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977); *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648 (1969).

The court of appeals properly applied this statutory requirement to the facts presented. Based upon a careful "search of the record in this case" (Pet. App. B, 10a), the court below found insufficient evidence to support a reasonable inference of injury to McClure caused by the alleged post-termination dealer boycott. The court's opinion supports this factual determination with detailed record citations to the testimony of McClure and his wife, as well as McClure's own witnesses, establishing that McClure could and did purchase Scubapro equipment after his termination in unlimited quantities and at dealer cost. (Pet. App. A, 6a-7a.)

Thus, the opinion below documents the following admissions and uncontroverted testimony:

A. McClure (Tr. 667-74), his wife (Tr. 1301-02, 1310-12), and dealer witnesses called by McClure (Tr. 2260-61,

2525) testified that within hours of his termination McClure made arrangements with two authorized dealers to purchase Scubapro equipment; that two additional dealers also began supplying McClure with Scubapro products in the ensuing months; and that these dealer-suppliers sold to McClure at dealer cost and placed no limits on the amount of equipment he could purchase. (Pet. App. A, 6a-7a.)[3]

B. In addition, both McClure (Tr. 668-70) and his wife (Tr. 1312-13, 1344) admitted that, besides the four dealers who were actually supplying them with Scubapro products, at least four more dealers had *affirmatively offered* to ship any additional Scubapro equipment they might request. The McClures, however, never pursued these offers and, indeed, according to his own witness (Tr. 2446), McClure actually turned down at least one such offer. (Pet. App. A, 7a.)

These admissions by McClure and the affirmative testimony of his witnesses fully confirm the court of appeals' finding that McClure "was not injured by the refusal of the few alleged boycotting dealers to sell equipment [since t]hey could offer him nothing more than the selling dealers were already providing" (Pet. App. A, 7a). This purely factual determination presents no issue warranting further review by this Court.

2. Contrary to petitioner's suggestion (Pet. 7-20), the decision below does not present any issue regarding the allocation of the burden of proof in boycott cases as to availability of alternative supplies. The court of appeals did not reverse merely because McClure failed to prove the negative proposition that alternative suppliers were unavailable. Rather, the

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[3] With respect to these supplying dealers, McClure's wife (Tr. 1236-37, 1311; Defendant's Exhibit 82) indicated that shipment time from the most distant dealer source was about the same as it had been previously from the USI factory. Similarly, although he had purchased from the USI factory on a strictly C.O.D. basis, both McClure (Tr. 673) and one of his dealer witnesses (Tr. 2260-61) testified that he could purchase equipment from his supplying dealers on credit or by a variety of other financial arrangements. (Pet. App. A, 7a.)

court expressly found that the *affirmative evidence* in the record—including McClure's own admissions and the uncontroverted testimony of his witnesses—demonstrated the existence of no less than eight alternative suppliers who either would or did sell McClure at dealer cost the Scubapro equipment he needed.[4]

For these same reasons, petitioner's assertion (Pet. 8-9, 15-20) that the decision below conflicts with other courts of appeals' decisions, such as *Malcolm* v. *Marathon Oil Co.*, 642 F.2d 845 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981), is incorrect. In *Malcolm*, the plaintiff introduced evidence of repeated unsuccessful efforts to obtain alternative supplies of gasoline, while the defendants "did no more than establish that Malcolm failed to contact a few [additional] known suppliers . . . [, but] did not establish that those dealers could or would have sold Malcolm the needed product in sufficient quantities to keep his business alive" (642 F.2d at 863). Here, by contrast, the undisputed record of petitioner's own evidence demonstrates that McClure had four actual dealer sources, and at least four untapped suppliers in reserve, who could, would and did sell McClure all of the Scubapro equipment that he might request.[5]

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[4] The court below did not base its factual determination on the testimony of "docile franchisees" (Pet. 8) or "the bare, uncorroborated deposition statements of some authorized dealers" (Pet. 25) that they would have sold equipment to McClure if he had called them. As documented by the supporting record citations in its opinion (Pet. App. A, 6a-7a), the court relied almost exclusively on the testimony of McClure (Tr. 667-74), McClure's wife (Tr. 1301-02, 1310-13), and witnesses Maynard (Tr. 2525), Reece (Tr. 2260-6), and Copeland (Tr. 2446), whose deposition testimony was originally taken and introduced at trial by McClure.

[5] Similarly, there is no conflict between the decision below and the Fourth Circuit's decision in *Wilder Enterprises* v. *Allied Artists Pictures Corp.*, 632 F.2d 1135, 1142-43 (4th Cir. 1980), where the plaintiff introduced "direct evidence" that he and other independent film exhibitors had been denied access to first-run films from which a

3. The factual and legal analysis of the court below is also consistent with this Court's decision in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981). Petitioner's assertion that *Payne* reflects an "[u]nstated but implicit . . . recognition that proof of violation is an absolute prerequisite to determining impact" (Pet. 20) overstates the case. To the contrary, the *Payne* decision "*emphasize[d]* that even if there has been a violation of the [antitrust laws, the treble damage plaintiff] is *not* excused from its burden of proving antitrust injury and damages" (451 U.S. at 568, emphasis added). Thus, as the court of appeals recognized (Pet. App. B, 11a), *Payne* actually confirms that causation of "injury in fact" is both a separate and essential element of a private treble damage suit.

A second issue in *Payne*, and one which sharply divided the Court, was whether the plaintiff had in fact presented sufficient evidence of injury to sustain an award of treble damages. Based on a review of the *particular factual record in that case*, the *Payne* majority found it "a close question whether petitioner's evidence would be sufficient to support a jury award even under our relaxed damage rules" (451 U.S. at 567). The majority declined to apply those more lenient rules, however, where there was no assurance that the defendant had actually violated the antitrust laws. Because the record presented such a "close question" as to the sufficiency of the plaintiff's injury evidence which could possibly turn upon whether a relaxed standard of proof were permitted, the *Payne* majority returned the case to the court of appeals for determination of the substantive violation issue. (*Id.* at 568.)[6]

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jury could infer that further efforts to obtain such films would have been futile. In the present case, McClure and his witnesses conceded that McClure's efforts to obtain Scubapro products had not been futile and, indeed, that McClure had located more dealer-suppliers, both actual and in reserve, than he needed.

[6] Although the Court ruled unanimously that proof of "actual injury" is an independent prerequisite for treble damage recovery, four dissenting Justices found "no basis for this Court undertaking to second-guess the Court of Appeals as to the sufficiency of evidence."

In its opinion below, the court of appeals specifically addressed petitioner's argument that *Payne* invariably requires a ruling on the question of substantive violation before reaching the independent "injury" element (Pet. App. B, 10a-11a). Based upon the particular factual record *in this case*, the court held: "It is obvious to us that even assuming the existence of an alleged boycott conspiracy, it was totally ineffective because there was no injury to McClure. Under these circumstances, a substantive ruling would serve no useful purpose."[7] (*Id.* at 10.) In this way, the court below confirmed that the evidence in this case on absence of injury is so compelling that, even assuming a violation, McClure's treble damage claim must fail. This purely factual determination as to sufficiency of evidence again presents no occasion for further review by this Court.

Thus, the dissent viewed the court of appeals' findings as "plainly correct" and would have affirmed the dismissal of plaintiff's complaint for failure to prove the fact of antitrust injury. (451 U.S. at 569-70.)

[7] A ruling on the substantive violation issue would have required the court of appeals to address all of USI's additional assignments of error concerning overly suggestive jury instructions, prejudicial and inflamatory hearsay, and insufficient evidence of a boycott conspiracy. USI submits that, for each of these additional reasons, the outcome below would have been no different.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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